No. 95-719

(3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM GASPERINI,

Petitioner,

—v.—

THE CENTER FOR HUMANITIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY TO OPPOSITION BRIEF

I. THE SECOND CIRCUIT'S DECISION RAISES COMPELLING QUESTIONS CONCERNING THE PROPER SCOPE OF FEDERAL APPELLATE REVIEW OF JURY AWARDS UNDER THE SEVENTH AMENDMENT.

Respondent concedes that a federal appellate court applying a *state* standard for reviewing a jury verdict for excessiveness in a diversity suit presents a compelling question of Seventh Amendment law appropriate for this Court's review. Brief in Opposition ("Opp. Cert.") at 7. To escape the conclusion that certiorari should be granted, however, respondent vainly argues that, notwithstanding the Second Circuit's actual holding, the court below actually *meant* to apply a federal standard in this case. *E.g.*, *id.* at 4-5, 9, 10. A plain reading of the Second Circuit's opinion refutes respondent's position and demonstrates that this compelling federal question is squarely presented in this case.

The importance of the Second Circuit's decision cannot be overstated. *See* Petition for a Writ of Certiorari ("Cert. Pet.") at 2-4, 8-9. The Second Circuit made a radical departure from the holdings of this Court and the other circuits by deciding that in a diversity action state, not federal, law governs appellate review of jury awards for excessiveness. 8a. But states are not bound by the Seventh Amendment, *Hardware Dealers Mutual Fire Insurance v. Glidden Co.*, 284 U.S. 151, 158 (1931), and are free to adopt any standard of appellate review of jury verdicts, however invasive. Thus, the net effect of the holding below is to render the Seventh Amendment inapplicable in diversity cases.

Respondent does not contest this, but would have this Court believe that the Second Circuit in effect applied a federal standard of review. Opp. Cert. at 4-5, 9-10. Respondent attempts to assure this Court that the difference between the federal and state standards "amount[s] to pure semantics." *Id.* at 7. These claims are directly controverted by the Second Circuit's holding, which expressly states:

> New York law provides that, in a case where a jury returns an itemized verdict, as the jury did in this case, the Appellate Division "shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney Supp. 1995). *This standard accords less deference to the jury's award than does the traditional standard*, under which the jury's award is to be upset only if it is so excessive as to shock the conscience of the court. *Consorti*, slip op. at 6712-13, 6717; *see also Matthews v. CTI Container Transp. Int'l*, 871 F.2d 270, 278 (2d Cir. 1989) (stating the traditional standard). *This being a diversity case, we are bound to follow the standard set forth in the New York statute*. *Consorti*, slip op. at 6713.

8a (emphasis supplied).

Thus, the Second Circuit plainly applied the state, not federal, standard of appellate review of the jury's verdict, *solely* because this is a diversity suit. Moreover, the court below specifically held that the two standards were materially different, with the state standard of review "accord[ing] less deference to the jury's award than . . . the traditional [federal] standard."[1] 8a. *See also Consorti v. Armstrong World Industries, Inc.*, 64 F.3d 781, 790 (2d Cir. 1995) (state standard requires appellate courts to "exercise closer control over jury awards"). The difference between the federal and state standards is not mere "semantics". Opp. Cert. at 7. Under the federal standard, at least as traditionally applied by the Second Circuit, absent abuse

[1] One of the anomalies of the holding below is that it would appear to allow additur in a diversity suit, *see* 8a (appellate court "shall determine" whether "an award is . . . inadequate"), even though federal courts are prohibited from increasing a jury award, even where the inadequacy is shocking to the conscience. *See Dimick v. Schiedt*, 293 U.S. 474 (1935); *Earl v. Bouchard Transp. Co.*, 917 F.2d 1320, 1331 (2d Cir. 1990).

of discretion or trial error,[2] a trial court's denial of a motion to set aside a jury verdict would not be reversed, even if the appellate court would have awarded a lesser sum, and even if it would have set aside the verdict had it been the trial court. *Batchowsky v. Penn Cent. Co.*, 525 F.2d 1121, 1124 (2d Cir. 1975); *Dagnello v. Long Island Railroad Co.*, 289 F.2d 797, 806 (2d Cir. 1961).

In contrast, under the New York state standard applied by the Second Circuit in this case, the appellate court is required to exercise *de novo* review of jury awards. *See* N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney 1995), *quoted in* 8a; *see also* Cert. Pet. at 8-9 & n.6.

Here, an improper exercise of *de novo* review is precisely what the Second Circuit engaged in. Contrary to respondent's suggestion, this is not a case where the appellate court merely required that there be some "support in the evidence" for the jury's award. Opp. Cert. at 9. There can be no dispute that there was some evidence to support every aspect of the jury's award, including properly admitted expert testimony. *See* Cert. Pet. at 4-5. On appeal, however, the Second Circuit reviewed selected portions of the trial evidence, finding them to be unpersuasive. Indeed, respondent correctly refers repeatedly to the "findings" below, conceding that the Second Circuit was engaged in an improper, *de novo* factual review. *See, e.g.*, Opp. Cert. at 2 (appellate court "found" it unlikely that petitioner's book would generate significant income); *id.* at 4 (appellate court did not "find" petitioner's expert witness persuasive); *id.* at 7 (arguing that "[p]etitioner has not seriously disputed the Second Circuit's factual finding . . ."). Again, this impermissibly

[2] Respondent contends that the Second Circuit did not address four "trial errors" raised below. Opp. Cert. at 3. In fact, each alleged error merely reformulates respondent's basic argument that the trial court erroneously allowed the jury to hear evidence of an industry standard in assessing damages. The Second Circuit considered and rejected respondent's arguments. 4a-5a.

invasive factual review is precisely what the Second Circuit was compelled to perform, once it incorrectly held that it was "bound" by the *de novo* state standard. 8a.

Respondent assures this Court that there are no Seventh Amendment concerns presented by this case because the Second Circuit ordered a new trial. Opp. Cert. at 7. Respondent misapprehends the purpose and meaning of the Seventh Amendment. The Seventh Amendment not only provides "the right of trial by jury," U.S. Const. amend. VII, it also guarantees that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." *Id.* Thus, the Seventh Amendment protects the sanctity of the jury's verdict from unwarranted judicial intrusion. Understanding that, this Court has never hesitated to intervene to protect a party's Seventh Amendment rights merely because a lower court afforded the "option" of a new trial. *See* cases cited in Point IV *infra*.

While attempting to discount the significance of the Second Circuit's abrogation of the Seventh Amendment, respondent concedes that the decision below reflects a widespread pattern in the lower federal appellate courts. As set forth in the petition, the decision below occurs in the context of increasingly aggressive federal appellate review of jury verdicts for excessiveness. Cert. Pet. at 2, 11-12. Quite frequently, appellate courts are simply exercising *de novo* review. Eric Schnapper, *Judges Against Juries – Appellate Review of Federal Civil Jury Verdicts ("Schnapper")*, 1989 Wis. L. Rev. 237, 320. Respondent does not dispute this expanding trend to ever greater federal appellate review of jury awards, but argues that "such review is necessitated by the increasing proclivity of juries to award excessive damage amounts." Opp. Cert. at 6. Certainly, such an important question of federal law, national in scope and affecting an ever increasing number of litigants, is worthy of this Court's review.[3]

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[3] Respondent argues that this case involves only an "exercise in (continued...)

There is no dispute about the present confusion and disarray among the federal courts regarding the proper standard of appellate review. *See* Cert. Pet. at 15. "Indeed," as respondent states "there are almost as many statements of the federal standard of review as there are judicial circuits." Opp. Cert. at 7; *see also id.* at 8-9. This Court's intervention is therefore required to bring order to this chaotic state of law, and set forth clearly the proper federal standard for appellate review of jury awards.

II. RESPONDENT DOES NOT DISPUTE THAT THE DECISION BELOW DIRECTLY CONFLICTS WITH THE HOLDINGS OF THIS COURT.

The Second Circuit's decision in this case directly conflicts with this Court's holdings in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) and in *Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977). *See* Cert. Pet. at 7-9. Respondent does not dispute this point. Indeed, respondent does not even mention *Browning-Ferris*, *Donovan*, or any other applicable decision of this Court. Thus, certiorari should be granted to review the square conflict between this Court's prior holdings and the decision below. Sup. Ct. R. 10.1(c).

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[3] (...continued)
dry mathematics," as opposed to "a personal injury case" where the exercise of appellate review is "much harder" because of "the subjective nature of the analysis." Opp. Cert. at 10 n.1. Respondent assures this Court that in such a context, the appellate courts "all strive to defer to the jury's subjective appraisals of value." *Id.* at 9.

This argument is wrong in both respects. First, assessing damages for a creative work of art is hardly an exercise in "dry mathematics." Second, the claim that appellate courts only aggressively review jury awards in "commercial" cases is inaccurate. In fact, "[t]he rate at which jury verdicts are overturned for excessiveness does not vary with the subject matter of the appeal." Schnapper, 1989 Wis. L. Rev. at 250.

III. THE DECISION BELOW PRESENTS A COMPELLING, ACTIVE AND LONG-STANDING CONFLICT AMONG THE CIRCUITS.

Just as respondent does not dispute the conflict between the Second Circuit's decision and this Court's holdings, it is uncontested that the decision below directly conflicts with the holdings of several other federal appellate courts. *See* Cert. Pet. at 10-12.[4]

Moreover, this conflict among the circuits is compelling, active and long-standing. Just two weeks before the Second Circuit's decision in this case, holding that a state standard applied in diversity suits, 8a, the Fourth Circuit reached the exact opposite holding. *See Laubach v. Khajawai*, No. 94-2421, 1995 WL 508879, at **2 (4th Cir. Aug. 29, 1995) ("the granting or denial of a new trial in a diversity action is a matter of procedure governed by federal law and not by state substantive law").

[4] The closest respondent comes to addressing this issue is to contend that the court below merely "compared the verdict with other cases involving similar injuries in the state whose substantive law governs the rights of the parties." Opp. Cert. at 5. While prior awards are not binding, an appellate court certainly may examine them to "guide" and "enlighten" the exercise of its review. *Martel v. Boardwalk Enterprises, Inc.*, 748 F.2d 740, 750 (2d Cir. 1984). But this is *not* the question presented by this petition, nor would mere reliance on prior state cases warrant overturning the jury verdict in this case. Indeed, the Second Circuit conceded that prior New York state appellate courts had upheld similar jury awards, as long as the transparencies were sufficiently unique. *See* 7a (citing *Girard Studio Group, Ltd. v. Young & Rubicam, Inc.*, 147 A.D.2d 357, 357, 536 N.Y.S.2d 790, 790 (1st Dep't 1989)). The issue presented here is not whether a court may look to prior cases, but whether a federal court sitting in diversity should apply a federal or state standard of appellate review.

Other decisions in the last few years similarly demonstrate that this conflict is on-going. *See, e.g., Peco Energy Co. v. Boden*, 64 F.3d 852, 859 (3d Cir. 1995); *Mayer v. Gary Partners & Co.*, 29 F.3d 330, 334-35 (7th Cir. 1994).

That the conflict has persisted for years, demonstrates that the federal circuits are not likely to resolve the issue among themselves. *Compare Lakin v. Daniel Marr & Son*, 732 F.2d 233, 235 (1st Cir. 1984) (in diversity action appellate court applies federal not state standard of review) *with In re Air Crash Disaster Near New Orleans*, 764 F.2d 1084, 1090 (5th Cir. 1985) ("in diversity case we may not affirm an award which could not be affirmed by the highest court of the state whose law we are applying").

Thus, certiorari should be granted to resolve this compelling, active and long-standing conflict among the circuits.

IV. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE SEVENTH AMENDMENT PERMITS A FEDERAL APPELLATE COURT TO REVIEW A JURY AWARD FOR EXCESSIVENESS.

Respondent largely fails to address the third question presented for review, namely, whether the Seventh Amendment permits a federal appellate court to review a jury award for excessiveness, in the absence of any trial error.[5]

[5] Respondent argues that this Court implicitly approved of federal appellate review of damage awards in *Honda Motor Co. v. Oberg*, ___ U.S. ___, 114 S. Ct. 2331, 2338. That case, however, does not address the issues raised by this petition. In *Honda* this Court ruled that a state court jury's award of punitive damages violated the due process clause of the Fourteenth Amendment. Because *Honda* was a state case, the Seventh Amendment did not apply.

There can be little doubt that this question is worthy of review, given that this Court has granted certiorari three times to address it. *See Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 n. 25 (1989); *Grunenthal v. Long Island R. Co.*, 393 U.S. 156, 158 (1968); *Neese v. Southern R. Co.*, 350 U.S. 77 (1955). In the absence of any pronouncement from this Court, the state of law in the lower federal appellate courts has become increasingly confused. Cert. Pet. at 14-16.

Other than expressing its fear at the prospect of this Court's review, Opp. Cert. at 7, respondent's only mention of this issue is its entirely unsupported claim that appellate review of jury verdicts for excessiveness "comports with common law precedent." *Id.* at 6. In fact, as set forth in the petition, "[t]o allow appellate review of the denial of a new-trial motion . . . would be a complete reversal of common-law practice and is very difficult to reconcile with the Seventh Amendment." 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2819 at 204 (2d ed. 1995). *See* Cert Pet. at 12-14. Respondent simply has no answer to this argument.

This Court should therefore grant review to resolve this compelling, long-standing question of federal law.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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